

1 JOHN T. MULLAN (SBN: 221149)
Email: jtm@rezlaw.com
2 CHAYA M. MANDELBAUM (SBN: 239084)
Email: cmm@rezlaw.com
3 MICHELLE G. LEE (SBN: 266167)
Email: mgl@rezlaw.com
4 ERIN M. PULASKI (SBN: 270998)
Email: emp@rezlaw.com
5 **RUDY, EXELROD, ZIEFF & LOWE, L.L.P.**
6 351 California Street, Suite 700
San Francisco, CA 94104
7 Telephone: (415) 434-9800
8 Facsimile: (415) 434-0513

9 JAY T. JAMBECK (SBN: 226018)
Email: jjambeck@leighlawgroup.com
10 MANDY G. LEIGH (SBN: 225748)
Email: mleigh@leighlawgroup.com
11 **LEIGH LAW GROUP**
12 870 Market Street, Suite 1157
San Francisco, CA 94102
13 Telephone: (415) 399-9155
14 Facsimile: (415) 795-3733

15 Attorneys for Plaintiff KEVIN WOODRUFF,
and classes of those similarly situated

16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN FRANCISCO DIVISION

21 KEVIN WOODRUFF, on behalf of himself
and classes of those similarly situated,

22 Plaintiffs,

23 vs.

24 BROADSPECTRUM DOWNSTREAM
SERVICES, INC., formerly TIMEC
COMPANY, INC., a corporation,

25 Defendant.

Case No. 3:14-CV-04105-EMC

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR ATTORNEYS' FEES AND
REIMBURSEMENT OF COSTS AND
EXPENSES; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Date: May 4, 2017

Time: 1:30 p.m.

Place: Courtroom 5, 17th Floor

Judge: Honorable Edward M. Chen

Third Amended Complaint Filed:
December 16, 2016

Trial Date: None Set

NOTICE OF MOTION AND MOTION**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

PLEASE TAKE NOTICE THAT on May 4, 2017 at 1:30 p.m., pursuant to this Court's December 19, 2016 Order Granting Motion for Preliminary Approval of the \$3.45 million class action settlement reached with Defendant Broadpectrum Downstream Services, Inc. (Dkt. 87), or as soon thereafter as this matter may be heard in the courtroom of the Honorable Edward M. Chen, Courtroom 5, 17th Floor, of the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs will, and hereby do, move this Court to award Class Counsel \$945,677.50 in attorneys' fees (approximately 27% of the settlement fund) and up to \$60,000 in costs and expenses.

This motion is made on the grounds that the requested award is fair, reasonable, and appropriate under the common fund doctrine under either the percentage-of-the-fund method or the lodestar method. The requested fee award represents approximately 27% of the settlement fund, which is well within the accepted range for common fund fee requests in the Ninth Circuit. The requested amount will be considerably less than Class Counsel's lodestar through the conclusion of this action, which will likely be nearly \$1,000,000 (calculated by multiplying Class Counsel's reasonable hours worked times their reasonable rates billed).

In addition, Class Counsel seek reimbursement of up to \$60,000 in litigation costs and expenses they have or will incur in connection with the prosecution of this action. To date, Class Counsel has incurred \$52,474.74 in litigation costs and expenses.¹ The costs and expenses for which Class Counsel seek reimbursement were reasonable and necessary to this litigation and were incurred for the benefit of the classes.

This motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the supporting declarations of John T. Mullan and Jay T. Jambeck, filed herewith; the files and records in this matter; any reply briefs or declarations (to

¹ Class Counsel will submit an updated costs amount prior to the Final Approval hearing. They will seek only their actual expenses incurred as of that time, but in no event will they seek more than \$60,000 in costs reimbursement.

1 be filed no later than April 20, 2017); and such argument as may be heard on this matter by the
2 Court.

3
4 DATED: January 9, 2017

Respectfully submitted,

5 RUDY, EXELROD, ZIEFF & LOWE, LLP
6 LEIGH LAW GROUP

7
8 By: 

JOHN T. MULLAN

9 *Attorneys for Plaintiff KEVIN WOODRUFF,*
10 *and classes of those similarly situated*
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

After more than two years of hard-fought litigation, involving voluminous documentary discovery, more than twenty depositions, briefing on Plaintiff's motion for class certification and multiple rounds of mediation, Class Counsel successfully resolved Plaintiff's and the Plaintiff Class' California Labor Code claims, securing a \$3.45 million, non-reversionary settlement with Defendant Broadspectrum Downstream Services, Inc., formerly Timec Company, Inc. (hereafter, "Defendant" or "Timec"). The settlement will afford substantial and immediate relief to approximately 2,500 current and former, primarily part-time Timec Field Employees, who will receive an average payment of more than \$36 per workweek — without even having to file a claim form.

Given their highly successful efforts in achieving this outstanding settlement — particularly in the face of significant litigation risks and uncertainties, discussed further *infra* — Class Counsel respectfully seek an attorneys' fee award of approximately 27 percent of the settlement fund, or \$945,677.50, as well as reimbursement of up to \$60,000 in costs and expenses reasonably and actually incurred, as authorized under the terms of the Settlement Agreement.

The requested attorneys' fee award is reasonable under both the percentage-of-the-fund method and a lodestar cross-check. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942, 944 (9th Cir. 2011); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The Ninth Circuit has described 25% of the common fund as the "benchmark" for an attorneys' fee award. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015); *In re Bluetooth*, 654 F.3d at 942. Many courts within this Circuit have approved attorneys' fee awards of up to one-third of the common fund. *See, e.g., In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (affirming fee award of one-third of settlement). The reasonableness of the fee request is further underscored by Class Counsel's lodestar, which to date exceeds the amount sought with significant additional work to be performed. *See Declaration of John T. Mullan In Support of Plaintiff's Motion for Attorneys' Fees and Expenses* ("Mullan Fee Decl.") ¶¶ 42-46. As detailed in the accompanying declarations of Class Counsel, Class Counsel spent more than 1700 hours litigating this case (not including

the additional time they will incur through final approval and distribution of settlement payments to Class Members) without any guarantee of payment, and faced substantial risk that they would not be compensated for their time. *Id.* ¶ 37. The hourly rates requested by Class Counsel are consistent with the market rates for attorneys of their level of skill and experience. *See* Mullan Fee Dec. ¶ 40. While the complexity and risks of this litigation would justify enhancement of the lodestar by a risk multiplier, *see Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002), *Class Counsel seek a fee award that is less than their actual lodestar.* *See* Mullan Fee Dec. ¶¶ 42-46. The requested award is thus fair, reasonable, and appropriate under the common fund doctrine, particularly in light of the excellent results achieved and the significant risks presented.

Class Counsel are also entitled to recover their reasonable litigation expenses from the common fund. *See Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). Here, Class Counsel seek reimbursement of up to \$60,000 in reasonable litigation costs and expenses they have incurred in connection with the prosecution of this action. Those costs and expenses include filing fees, mediator fees, expert witness fees, travel, and transcripts. These expenses are of the type ordinarily billed to paying clients, and were incurred for the benefit of the Class. Class Counsel are therefore entitled to reimbursement of these expenses.

II. BACKGROUND

A. Class Counsel Devoted Substantial Time and Resources to Litigating This Case on a Contingency Basis, Despite the Risks Involved.

Class Counsel have devoted substantial time and resources to investigating and litigating this complex case over more than three years, in the face of significant risk and uncertainty.

Plaintiff Woodruff and Joseph Vierra initially filed this action on September 10, 2014 (Dkt. 1). They filed a First Amended Complaint on December 2, 2014, alleging exhaustion of the PAGA administrative requirements (Dkt. 22). On May 3, 2016, Plaintiff Woodruff filed a Second Amended Complaint to (1) remove Mr. Vierra as a named plaintiff because he could not perform that role after a serious automobile accident and (2) to substitute Broadspectrum Downstream Services, Inc. as the Defendant following a name change in the corporate entity (*see* Dkt. 45 and 46).

1 The Second Amended Complaint states claims for failure to pay Class Members for hours
 2 worked and overtime hours worked in violation of Labor Code sections 218.6, 1194, 1194.2,
 3 1197, and 510, failure to provide accurate wage statements in violation of Labor Code sections
 4 226 and 1174, and failure to pay waiting time penalties to Class Members in violation of Labor
 5 Code sections 201, 202, and 203. Plaintiff also sought to recover penalties under PAGA pursuant
 6 to Labor Code sections 2698-2699.5. Plaintiff also alleged that Defendant violated California's
 7 unfair competition law, California Business and Professions Code sections 17200, *et seq.*, by
 8 failing to pay minimum wage and overtime, failing to pay all wages due upon termination of
 9 employment, and failing to provide accurate wage statements in violation of the Labor Code.
 10 Plaintiff sought injunctive and declaratory relief; damages, including unpaid wages due for all
 11 regular and overtime work required, suffered, or permitted by Defendant; penalties; restitution,
 12 including unpaid wages due for all regular and overtime work required, suffered, or permitted by
 13 Defendant; pre-judgment and post-judgment interest; and reasonable attorney's fees, costs, and
 14 expenses of this action.

15 Timec raised numerous defenses to Plaintiff's off-the-clock claims, including that there is
 16 no common policy, practice or procedure to deprive employees of pay for compensable
 17 preliminary activities, that overtime claims under California law fail because all class members
 18 are governed by a collective bargaining agreement ("CBA") with the International Union of
 19 Petroleum Industrial Workers Union, which satisfies the exemption from overtime found in
 20 California Labor Code § 514 and California Wage Order 16, and that Plaintiff's claims are
 21 preempted under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (Dkt. 9
 22 & 78).

23 As noted in the Motion for Preliminary Approval (Dkt. 73), Plaintiff's counsel conducted
 24 detailed factual and legal investigations into these claims. Pursuant to a court-sanctioned *Belair*
 25 opt-out notice process, Plaintiff received a class list consisting of current and former employees
 26 (Mullan Fee Dec., ¶ 25). The Parties exchanged mediation-targeted discovery (*id.*, at ¶ 22).
 27 Plaintiff's counsel also conducted an investigation, interviewing approximately 50 putative class
 28 members (*id.*, at ¶ 21). The parties attended a mediation before highly-regarded and experienced

mediator Jeffrey Ross in September 2015 (*id.*, at ¶ 28). Defendant then produced certain policy documents and information regarding a number of Field Employees' electronic gate-read data and shift times (*id.*, at ¶ 30). The parties participated in a second day of mediation in March 2016, which again failed to result in a settlement (*ibid.*).

The parties also engaged in extensive formal discovery. Both parties propounded and responded to document requests and interrogatories (*id.*, ¶ 22). Plaintiff's counsel took two days of depositions of Defendant pursuant to Rule 30(b)(6) and Defendant deposed Plaintiff Woodruff (*id.*, at ¶ 23). In connection with briefing on Plaintiff's motion for class certification, Plaintiff's counsel gathered and submitted numerous putative Class Member declarations from Field Employees who have worked at all 14 refineries in California, as well as a declaration from proposed statistical evidence expert, Richard Drogin (*id.*, at ¶ 24). Defendant also submitted over twenty declarations with its opposition, including refinery workers, supervisors and other personnel, and two experts. The parties provided document production related to and deposed sixteen of these declarants and deposed all three experts (*id.*).

It was only after these extensive investigations, and after Plaintiff's motion for class certification was fully briefed, that the parties reached a settlement in this case (*see* Dkt. 69). In the weeks prior to reaching a settlement in September 2016, the parties continued to engage in intensive mediation discussions through Mediator Ross (Mullan Fee Dec., ¶ 31). At the time of the settlement, the parties were fully familiar with the facts and law, and the strengths and weaknesses of the class claims (*id.*, at ¶ 32). After lengthy negotiations, the parties reached an agreement in principle. Counsel then spent substantial additional time ironing out the details of the Settlement (*id.*, at ¶ 33).

B. The Settlement Obtained Is Highly Beneficial to Class Members.

The \$3.45 million, non-reversionary settlement is an excellent result for the class, particularly in light of the substantial risks and uncertainties faced by plaintiffs. Based on the allocation of the settlement fund, at least \$2,259,322.50 will be distributed to Class Members who do not timely exclude themselves from the settlement by opting out (or to the California Secretary of State Unclaimed Property Fund and *cy pres* recipient if settlement payments are not

1 cashed). The average gross (i.e. pre-tax) payment to each Class Member will be approximately
 2 \$900, or more than \$36 per workweek, *after* deducting for the projected attorneys' fees and costs,
 3 service payments, and administrative costs.² Under the Settlement, every Class Member who can
 4 be located and who does not timely opt out will receive a settlement payment without any claims
 5 process, thereby maximizing Class Member participation. Settlement Agreement, Dkt. 79-1
 6 ("Settlement") ¶¶ 48-52. The Settlement also includes numerous safeguards to ensure that Class
 7 Members are found and receive their settlement checks. Settlement ¶¶ 47-48.

8 These are significant amounts in absolute terms, and they are particularly significant
 9 amounts given that the Class Members are relatively low paid part-time workers who worked for
 10 Defendant on a temporary basis.³ Class Counsel believe that the Settlement provides for a
 11 significant portion of the likely recovery were Plaintiffs to fully prevail as a Class at a trial on the
 12 merits. The proposed settlement is over 23% of the amount that Plaintiff's counsel contended
 13 was the maximum exposure. *Id.*

14 Although Plaintiffs believe their claims are strong on the merits, Class Counsel
 15 acknowledge that further litigation would have presented significant risks. At the time the parties
 16 reached settlement, pending before the Court was Plaintiff's motion for Rule 23 class
 17 certification. Had Timec defeated Plaintiff's Rule 23 motion for class certification, the

19 ² Since Class Counsel are only seeking fees in the amount of \$945,677.50 instead of the
 20 \$1,035,000 permitted by the settlement agreement (*see* Settlement ¶ 41) and as estimated in the
 21 notice (*see* Dkt. 79-1), the amount of the net settlement fund available for distribution to the class
 22 will be approximately \$89,322 higher than Class Counsel estimated in their motion for
 preliminary approval. Moreover, because there are fewer workweeks than the 69,000 originally
 estimated, the per workweek recovery of more than \$36 is higher than previously estimated.

23 ³ For illustration purposes, Class Counsel points out that the average per workweek
 24 amount of approximately \$36 compares very favorably to wage and hour settlements approved
 25 by the Court in the past. For example, in *Viceral v. Mistras Group, Inc.*, No. 15-2198 (N.D. Cal.
 26 Oct. 11, 2016) (Dkt. 83), the Court granted preliminary approval to a class action settlement for
 27 alleged off-the-clock uncompensated work and meal-and-rest period violations where the average
 28 workweek recovery was \$24.05 for a California class and \$5.06 for FLSA class members. In
 comparison, Class Members in this case stand to recover on average an estimated \$36 per
 workweek, calculating the net settlement fund as \$2.25 million (including \$50,000 to be
 distributed to the Class for PAGA penalties) and estimating 62,458 workweeks.

approximately 2,500 class members would be denied the opportunity to pursue their claims in this litigation altogether. Even if Plaintiffs prevailed on the Rule 23 certification motion, Plaintiff and the Class faced the risk that Timec would persuade the Court to grant summary judgment on its preemption affirmative defenses. Even if Plaintiff and the Class prevailed on all of these motions, they would have had to prove liability and damages at trial, not to mention facing possible motions to decertify the class. Even if they prevailed at trial, they would have faced continued risk in potentially litigating these issues on appeal.

While plaintiffs believe they would have prevailed on class certification and on the merits of their claims, the settlement eliminates any risk that Class Members might not recover any money. Moreover, the settlement results in substantial payments to the Class Members early in 2017, whereas continued litigation could have delayed any potential recovery by several years, even if Plaintiff and the Class had ultimately prevailed.

III. ARGUMENT

A. **The \$945,677.50 Class Counsel Seek in Attorneys' Fees is Reasonable Under Either the Percentage-of-the-Fund Method or the Lodestar Method.**

Class Counsel seek fees in the amount of \$945,677.50, or approximately 27% of the settlement fund. The amount requested is reasonable under both the percentage-of-the-fund method and a lodestar cross-check. The percentage Class Counsel seeks is well within the Ninth Circuit's typical range for common fund awards. *See, e.g., In re Online DVD-Rental*, 779 F.3d at 949, 953. Class Counsel's reasonable lodestar (calculated by multiplying Class Counsel's reasonable hours worked times their reasonable rates) will, by the time this matter is concluded, significantly exceed the amount of fees Class Counsel is requesting.

1. **Class Counsel Are Entitled to an Award of Attorneys' Fees Because the Litigation Recovered a Certain and Calculable Fund for the Plaintiff Class.**

Courts have long recognized that when counsel's efforts result in the creation of a common fund that benefits plaintiffs and unnamed class members, class counsel have an equitable right to be compensated from that fund as a whole. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (U.S. Supreme Court "has recognized consistently that a

litigant or a lawyer who recovers a common fund ... is entitled to a reasonable attorney's fee from the fund as a whole"); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (recognizing common fund doctrine). The common fund doctrine rests on the understanding that attorneys should normally be paid by their clients, and that unless attorneys' fees are paid out of the common fund, those who benefit from the fund will be unjustly enriched. *Boeing*, 444 U.S. at 478. To prevent this unfair result, courts exercise their inherent equitable powers to assess attorneys' fees against the entire fund, thereby spreading the cost of those fees among all those who benefit from it. *Id.*

The settlement of this litigation resulted in the recovery of \$3.45 million to be distributed to Class Members. Because none of the Class Members paid fees to Class Counsel for their efforts during the litigation, equity requires them to pay a fair and reasonable fee, based on what the market would traditionally require, no less than if they had hired private counsel to litigate their case individually. *Id.*, at 478-82.

2. The Requested Fee Is Reasonable Under the Percentage-of-the-Fund Method.

Where, as here, fees are requested from a common fund, the court has discretion to use either the percentage-of-the-fund method or the lodestar method to evaluate the reasonableness of the fee amount requested. *In re Bluetooth*, 654 F.3d at 942. In common fund cases, it is widely accepted for courts to award fees "based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); see *In re Online DVD-Rental*, 779 F.3d at 953 (district court appropriately calculated the fee award as a percentage of the total settlement fund, including notice and administrative costs and litigation expenses); *Six (6) Mexican Workers*, 904 F.2d at 1311 ("[A] reasonable fee under the common fund doctrine is calculated as a percentage of the recovery."); *State of Fla. V. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (recognizing a "recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases").

While the Ninth Circuit has described 25% of the common fund as the "benchmark" for an attorneys' fee award (see, e.g., *In re Online DVD-Rental*, 779 F.3d at 949; *In re Bluetooth*, 654

1 F.3d at 942; *Vizcaino*, 290 F.3d at 1047-48), many federal courts within this Circuit have
 2 awarded as much as one-third of the common fund in fees. *See, e.g., In re Pac. Enterprises*, 47
 3 F.3d at 378-79 (affirming fee award of one-third of settlement); *Hester v. Vision Airlines, Inc.*,
 4 2014 WL 3547643 at *11 (D. Nev. July 17, 2014) (awarding 30% of common fund); *Ching v.*
 5 *Siemens Industry, Inc.*, C 11-4838 MEJ, 2014 WL 2926210 at *7-8 (N.D. Cal. June 27, 2014)
 6 (awarding 30% of gross settlement fund of \$425,000); *Elliott v. Rolling Frito-Lay Sales LP*, 2014
 7 WL 2761316 at *8 (C.D. Cal. June 12, 2014) (awarding 30% of gross settlement fund); *Barbosa*
 8 *v. Cargill Meat Solutions Corp.*, 1:11-CV-00275-SKO, 2013 WL 3340939, at *15 (E.D. Cal. July
 9 2, 2013) (awarding 33.3% of fund in wage-and-hour class action); *Estrella v. Freedom Fin.*
 10 *Network, LLC*, C09-03156 SI, 2012 WL 4645012, at *3 (N.D. Cal. Oct. 1, 2012) (awarding 33½
 11 percent of \$1.9 million settlement fund); *Stuart v. Radioshack Corp.*, C07-4499 EMC, 2010 WL
 12 3155645, at *6 (N.D. Cal. Aug. 9, 2010) (awarding one-third of settlement fund in wage and hour
 13 class action and noting that “[t]his is well within the range of percentages which courts have
 14 upheld as reasonable in other class action lawsuits”); *Vasquez v. Coast Valley Roofing, Inc.*, 266
 15 F.R.D. 482, 491-92 (E.D. Cal. 2010) (awarding 33½ percent in wage and hour class action);
 16 *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104, at *8-9 (S.D. Cal. June 1, 2010) (awarding
 17 33½ percent); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *23 (C.D.
 18 Cal. June 10, 2005) (awarding one-third of common fund); Mullan Fee Dec., ¶¶ 5-19 (describing
 19 multiple cases handled by Class Counsel in which courts awarded fees using the common fund
 20 method at or above the 25% benchmark). Indeed, “[n]ationally, the average percentage of the
 21 fund award in class actions is approximately one-third.” *Multi-Ethnic Immigrant Workers*
 22 *Organizing Network v. City of Los Angeles*, No. CV 07-3072 AHM, 2009 WL 9100391, at *4
 23 (C.D. Cal. June 24, 2009); see also Newberg on Class Actions, § 15.73, and the cases cited
 24 therein: “regardless of whether the percentage method or the lodestar method is used, fee awards
 25 in class actions average around one-third of the recovery.” Accordingly, the percentage Class
 26 Counsel seeks — approximately 27% — is well within the Ninth Circuit’s typical range for
 27 common fund awards.

28 ///

1 **3. The Requested Fee Is Reasonable Under a Lodestar Cross-Check.**

2 **a. Class Counsel's Lodestar Exceeds the Fee Amount Requested,**
 3 **and Is Based on Reasonable Hours and Rates.**

4 While courts have discretion in common fund cases to calculate a fee award using either
 5 the percentage-of-the-fund approach or the lodestar approach, courts are encouraged to cross-
 6 check both figures against one another to confirm the reasonableness of the award. *In re*
 7 *Bluetooth*, 654 F.3d at 942, 944-45; *Vizcaino*, 290 F.3d at 1050 (“[W]hile the primary basis of the
 8 fee award remains the percentage method, the lodestar may provide a useful perspective on the
 9 reasonableness of a given percentage award.”).

10 Here, a lodestar cross-check confirms that the approximately 27% fee award requested is
 11 reasonable. As set forth in the accompanying declaration of John T. Mullan, Class Counsel's
 12 lodestar to date exceeds \$945,677.50. Accordingly, the requested fees are *lower* than Class
 13 Counsel's lodestar, and will be significantly lower once additional time is incurred preparing the
 14 motion for final approval of the settlement, and overseeing the settlement administration).
 15 Mullan Fee Decl. ¶¶ 42- 46.

16 The hours and rates used to calculate Class Counsel's lodestar are reasonable. Class
 17 Counsel have devoted more than 1700 hours to this litigation. Mullan Fee Decl. ¶¶ 43 & 45. As
 18 reflected above and in the accompanying declarations of Class Counsel, this time was spent on
 19 numerous essential litigation tasks in prosecuting this action over more than two years, including
 20 but not limited to: (1) conducting pre-filing investigation, both legal and factual; (2) case
 21 management, including preparing for case management conferences and drafting case
 22 management statements; (3) discovery, including interviewing nearly 100 Class Members,
 23 propounding and responding to extensive written discovery, including requests for production of
 24 documents and interrogatories, deposing two of Defendant's Rule 30(b)(6) witnesses, and
 25 reviewing voluminous amounts of documentary and electronic data produced in discovery; (4)
 26 preparing a motion for Rule 23 class certification, including preparing for and taking or
 27 defending the depositions of the Named Plaintiff and multiple Class Member and witness
 28 declarants; (5) preparing for and participating in mediations and subsequent settlement
 negotiations; (6) drafting and negotiating the Settlement Agreement and preparing the settlement

1 approval papers, including the motion for preliminary approval. Mullan Fee Decl. ¶¶ 47-48. In
 2 calculating this lodestar hours figure, Class Counsel exercised billing judgment as they would for
 3 a fee-paying client, reducing hours to eliminate redundancies, inefficiencies, and other time not
 4 appropriately charged to a paying client. Mullan Fee Decl. ¶ 41; Jambeck Fee Dec. ¶¶ 10 & 13.
 5 Moreover, because the declarations report time before the filing of this motion, they do not
 6 reflect additional work Class Counsel will have performed by the time this motion is heard,
 7 including briefing the motions for final approval and overseeing the settlement notice process,
 8 nor work Class Counsel will undertake on the case to obtain final settlement approval and to
 9 ensure that the settlement is fully implemented and any issues that may arise are resolved⁴ – all
 10 time for which Class Counsel will not seek additional compensation.

11 The rates used in calculating Class Counsel’s lodestar are also reasonable. The lodestar
 12 should be calculated using hourly rates that are “the prevailing market rates in the relevant
 13 community.” *Blum*, 465 U.S. at 895. Courts typically apply each attorney’s current rates for all
 14 hours of work regardless of when performed to account for the delay in payment resulting from
 15 the years it took to litigate the case. *See Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989) (court
 16 should account for delay in payment by applying current rather than historic hourly rates); *Prison*
 17 *Legal News v. Schwarzenegger*, 608 F.3d 446, 453-54 (9th Cir. 2010). Here, Class Counsel’s
 18 experience, reputation, and ability justify the rates charged. *See* Mullan Fee Dec. ¶¶ 3-20;
 19 Jambeck Fee Dec. ¶¶ 3-6. Further, these rates are commensurate with those prevailing for
 20 attorneys with comparable skill and experience litigating complex wage-and-hour class and
 21 collective actions. Mullan Fee Dec. ¶¶ 39-40; Jambeck Fee Dec., ¶ 14. These hourly rates, or
 22 their historical equivalents, have been paid to Class Counsel by paying clients, and have
 23 repeatedly been approved by other courts. *See* Mullan Fee Dec. ¶¶ 3-20; 40; Jambeck Fee Dec.
 24 ¶ 14.

25
 26 ⁴ Based on Class Counsel’s experience in other cases, it is very likely that Class Counsel
 27 will reasonably expend at least another 100 hours on this matter. Using a blended hourly billing
 28 rate of \$500, this corresponds to additional lodestar of approximately \$50,000. Mullan Fee Decl.
 ¶ 46.

b. The Legal Principles Behind Risk Multipliers Further Support the Reasonableness of the Fee Requested.

In common fund cases, courts frequently apply multipliers to the lodestar to reflect the risks involved, the complexity of the litigation, and other relevant factors. *See Vizcaino*, 290 F.3d at 1051 (courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases”) (internal quotation marks and citation omitted). Such an enhancement “mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases.” *Id.* For these reasons, courts routinely enhance lodestar amounts based on multipliers ranging from 2 to 4 or even higher. *See id.* (approving multiplier of 3.65); *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 298 (N.D. Cal. 1995) (noting that multipliers in the 3-4 range are common in class action lodestar awards); *Craft v. Cnty. of San Bernardino*, 624 F.Supp.2d 1113, 1125 (C.D. Cal. 2008) (awarding multiplier of 5.2 and collecting cases with cross-check multipliers ranging from 4.5 to 19.6).

Though case law suggests that Class Counsel here would be justified in seeking a risk multiplier, the fee amount Class Counsel seek actually reflects a *negative* multiplier. The fact that Class Counsel seek to recover less than their lodestar further underscores the reasonableness of the requested fee award.

B. Class Counsel Are Entitled to Recover Their Reasonable Litigation Costs and Expenses, Which Have Inured to the Benefit of the Class.

Class Counsel also request reimbursement from the fund in an amount of up to \$60,000 for litigation costs and expenses reasonably incurred. *See* Settlement ¶¶ 15 & 41. Like attorneys’ fees, these expenses should be paid from the common fund because all Class Members should share their fair share of the costs of the litigation, from which they benefitted. The expenses for which Class Counsel seek reimbursement are the normal costs of litigation that are traditionally billed to paying clients. *See, e.g., Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (attorneys should recover reasonable out of pocket costs of the type ordinarily billed to paying clients). Class Counsel have

1 incurred at least \$52,474.74 in litigation costs and expenses to date, and will inevitably incur
 2 additional necessary costs through the conclusion of this matter, including costs related to the
 3 motions for final approval, attorneys' fees, and service awards, and overseeing the settlement
 4 administration process.⁵ The expenses to date for which Class Counsel seek reimbursement are
 5 detailed in the supporting declarations of Class Counsel. Mullan Fee Decl. ¶¶ 49-50; Jambeck
 6 Fee Dec. ¶¶ 12-13. As set forth therein, all of these costs were necessary to the prosecution of
 7 this litigation, were the sort of expenses normally billed to paying clients, and were made for the
 8 benefit of the class. Mullan fee Decl. ¶ 49; Jambeck Fee Dec. ¶¶ 12-13. Accordingly, they are
 9 reimbursable. *See, e.g., In re Immune Response Sec. Litig.*, 497 F.Supp.2d 1166, 1177-78 (S.D.
 10 Cal. 2007).

11 **C. Class Members Will Have Notice and an Opportunity to Object to Class**
 12 **Counsel's Request for Attorneys' Fees and Costs.**

13 The Notice of Settlement will be sent to all Class Members by February 7th and will
 14 describe the terms of the settlement, including the maximum amounts Class Counsel are
 15 authorized to request and receive for attorneys' fee and costs. Notice of Settlement, Dkt. 79-1.
 16 The Notice of Settlement also refers Class Members to a case website, where this motion and
 17 supporting documents will be posted by the time the Notice is mailed. *Id.*, Notice at 22.
 18 Pursuant to the terms of the Settlement Agreement, the deadline for objecting to or opting out of
 19 the Settlement is 60 days after the Notice is mailed by the Claims Administrator to the Class
 20 Members. *See Id.*, Notice at 17 & 22. Class Members therefore will have ample time before the
 21 objection/opt-out deadline to review this fee and cost request and to lodge any objections or opt
 22 out of the Settlement. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-95 (9th
 23 Cir. 2010). Class Counsel will address Class Members' response to this request for fees and
 24 costs in their reply brief in support of this motion, and at that time respond to any Class Member
 25 objections, in the event that there are any, to the fee and cost request.

26 _____
 27 ⁵ Class Counsel will submit an updated costs amount prior to the Final Approval hearing.
 28 They will seek only their actual expenses incurred as of that time, but in no event will they seek
 more than \$60,000 in costs reimbursement.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Class Counsel respectfully request that the Court award Class
3 Counsel \$945,677.50 in attorneys' fees and up to \$60,000 in costs and expenses from the
4 Settlement Fund.

5 DATED: January 9, 2017

Respectfully submitted,

6 RUDY, EXELROD, ZIEFF & LOWE, LLP
7 LEIGH LAW GROUP

8
9 By: 

10 JOHN T. MULLAN

11 *Attorneys for Plaintiff KEVIN WOODRUFF,*
12 *and classes of those similarly situated*
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